IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO. 279 OF 2004.

1. Shri Constancio Luis Caetano
   Rubino Lobo alias Constantino
   Luis Caetano Rubino Lobo
   alias Louis Caetano Lobo
   (since deceased by LRs.:
   (a) Shri Hubert Lobo and
       wife
   (b) Smt. Ophelia D'Souza
       Lobo, both r/at House
       No. 124/H, North Bombay
       Co-operative Housing
       Society, Juhu, Bombay.
   (c) Smt. Suzanne Lobo
       Fernandes and husband
   (d) Shri Cleto Fernandes,
       both r/at H. No. 298/15,
       Kilachand Bldg., Princess
       Street, Bombay-400 002.
2. Smt. Julie Luis Lobo,
   both r/at North Bombay
   Co-operative Housing Society,
   Juhu, Bombay.
   All represented by their
   duly Constituted Attorney
   Shri Joviano Joel Dias,
   r/at Ambora, Camurlim,
   Salcete Goa. ... Petitioners.

Versus

1. Smt. Leandrina Antao,
   widow,
2. Shri Ligorio Francisco Dias
   alias Lourencino Dias (since
   deceased through Legal Heir:
   (a) Shri Lincoln Nestor Dias,
       both r/at H. No. 134,
       Ambora, Goa.
3. Smt. Ludovino Antao (since
   deceased through Legal Heirs:
   3(a). Shri Sebastiao Antao
         and wife
   3(b). Smt. Clelia Antao.
   3(c). Shri Antonio Antao and
         wife
   3(d). Smt. Nora A. Antao.
   3(e). Shri Inacio Antao and
         wife
   3(f). Smt. Maria Antao.
   3(g). Shri Reginaldo Antao
         and wife
   3(h). Smt. Rosy Antao.
   3(i). Shri John Brito Antao

and wife
3(j). Smt. Jessy Antao.
4. Shri Jose Filipe Antao,
All r/at H. No. 133,
c/o. Zilla Bakery, Ambora,
Goa. ... Respondents.

Mr. M.B. D'Costa with Mr. J.A. Lobo, Advocates for the Petitioners.

Coram : S.A. BOBDE, J.

Date : 2nd July 2004.

ORAL ORDER.

The petitioners challenge the Order, dated 8th June 2004, by which the learned appellate Court has framed an additional issue and remanded the matter to the trial Court to enable the trial Court to give a finding on the issue. This Order was passed in appeal by the original defendants against the Judgment and Decree, dated 30th April 1996, arising out of the Regular Civil Suit No. 294/87/C, passed by the learned Civil Judge, Junior Division, Margao. The suit filed by the plaintiffs/petitioners was decreed. The petitioners have been declared as owners in title of the suit property under Survey No. 109/7, of Camurlim Village, admeasuring 503 square metres, corresponding to Matriz No. 167 with consequential relief of deletion of the name of defendant no. 1 from the survey records of Camurlim Village, bearing Survey No. 109/7 and inclusion of the names of the plaintiffs therein. The defendants were also restrained from interfering in the suit property. The learned appellate Court while

hearing the appeal noticed that the plaintiffs have amended the plaint and added a prayer for restoration of possession, whereas, the defendants have claimed in their written statement that such a prayer for restoration of possession by way of amendment is time barred. Eventhough the written statement was amended in the year 1994, vide Order under Exhibit 9, no additional issue in regard to the defendants' plea that the plaintiffs' plea for restoration of possession was framed. According to the learned appellate Court, in order to consider whether the plaintiffs' plea for restoration of possession is tenable or not, it was necessary to frame an additional issue as to whether the defendants are in exclusive possession of Survey No. 109/7. The learned appellate Court, therefore, framed the following additional issue:-

> "Whether the defendants prove that they are in exclusive possession of survey no. 109/7 as owners thereof since the date of the Sale Deed dated 28-9-1965 against its alleged owners or against any claimants?"

After framing the additional issue, the learned appellate Court remanded the matter to the trial Court for allowing the parties to lead evidence on the issue and decide the same. There is no error of jurisdiction or material irregularity in the Order framing the additional issue, since the additional issue would arise directly on the basis as a result of the amendment to

the written statement.

2. The learned counsel for the petitioners submitted that the appellate Court had declined to frame an additional issue by Order, dated 10th February 2004. I observe from the earlier Order, vide paragraph 5, the appellate Court had declined to frame an additional issue on the request of the plaintiffs. The appellate Court declined to do so on the ground that there was no amendment to the pleadings and there was only an amendment to the prayer clause, vide paragraph 5. That is to say, by amendment to the prayer clause the plaintiffs had sought a prayer for possession of the suit property from the defendants. I fail to see how declining to frame an additional issue on the ground that there is an amendment to the prayer clause only and not to the pleadings in the plaint would bar an appellate Court from framing an additional issue, which arises out of an amendment made to the written statement, which is part of the pleadings, and has a bearing on the relief that may eventually be granted by the Court.

3. There is no merit in this petition, which is, hereby, dismissed.

(S.A. BOBDE)
JUDGE.

ed's.